

83-108

Office - Supreme Court, U.S.
FILED

IN THE SUPREME COURT OF THE UNITED STATES 1983

OCTOBER TERM, 1982

ALEXANDER L. STEVAS,
CLERK

No.

MARY F. SHOPE, Executrix
of the Estate of GEORGE W.
SHOPE, deceased,

Petitioner,

v.

MARGARET M. HECKLER,
Secretary of Health and
Human Services,

Respondent.

APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JOHN DENISON RAY
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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 82-1678

MARY F. SHOPE, Executrix of the
Estate of George W. Shope, deceased,
Social Security #251-05-5572

Appellant,

v.

RICHARD SCHWEIKER, Secretary of
Health and Human Services of
the United States,

Appellee.

Appeal from the United States District
Court for the Western District of North
Carolina, at Bryson City. Woodrow W.
Jones, Chief District Judge.

Argued: February 10, 1983

Decided: March 24, 1983

Before SPROUSE and ERVIN, Circuit Judges,
and BUTZNER, Senior Circuit Judge.

Appendix A

1a

James H. Holloway, Western North Carolina
Legal Services (on brief) for Appellant;
Max O. Cogburn, Jr., Assistant United
States Attorney (Charles R. Brewer, United
States Attorney on brief) for Appellee.

PER CURIAM:

George W. Shope, now deceased, filed a claim for Social Security disability insurance benefits, 42 U.S.C. § 423, on August 8, 1977. The Secretary denied Shope's claim initially and on reconsideration, on the grounds that Shope did not meet the necessary earnings requirement. Shope made informal inquiries at the local Social Security office concerning administrative procedures whereby he could obtain a hearing on the Secretary's denial, but he did not properly request a hearing on his claim until December 15, 1980, more than two years after the time prescribed by regulation. 20 C.F.R. § 404.933. An Administrative law judge then dismissed the request for a hearing on the grounds that Shope had not filed a timely request and because he had not established "good cause" to extend the time for filing.

Shope died on May 31, 1931, and his widow, Mary Shope, was substituted as claimant. After an unsuccessful appeal to the Appeals Council, Mrs. Shope sought review in the district court of the Secretary's dismissal of her hearing request. The district court granted the Secretary's motion to dismiss the action for lack of jurisdiction. We have considered the record, the briefs and argument of counsel, and conclude that the district court was correct in holding that the Secretary's decision did not constitute a "final decision" under 42 U.S.C. § 405(g) and that the court therefore lacked jurisdiction. Accordingly, the judgment of the district court is affirmed.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

March 24, 1933

TO: James H. Holloway, Esq.
Patrick Lordeon, Esq.

Max Cogburn, AUSA

NOTICE OF JUDGMENT

Judgment was entered in Case No. 32-1678
this date.

The Court's opinion is enclosed.

Petition for Rehearing (FRAP 40)

Filing Time A Petition may be filed with-
in 14 days after judgment.
No extension will be granted
save for the most compelling
reasons. Requests based on
grounds such as miscalcula-
tion of time or a need to
consult with others will be
peremptorily denied.

Purpose A petition should only be
made to direct the Court's
attention to one or more of
the following situations:

1. A material fact or law
overlooked in the deci-
sion.
2. A change in the law
which occurred after the
case was submitted and
which was overlooked by
the panel.

3. An apparent conflict with another decision of the Court which is not addressed in the opinion.

The filing of a petition in order merely to reargue the case is an abuse of the privilege.

Statement
of Counsel

A petition shall contain an introduction stating that, in counsel's judgment, one or more of the situations exist as described in the above "Purpose Section". The points to be raised shall be succinctly listed in the statement. Lacking such a statement, the petition will be returned to counsel without filing.

Form

The 15 page limit allowed by the Rule shall be observed. The Court requires 15 copies of the petition. however, a pro se party who is indigent may file the original only.

Bill of Costs (FRAP 39)

Filing
Time

A party to whom costs are allowed, who desires taxation of costs, shall file a bill of costs within 14 days after judgment.

Mandate (FRAP 41)

Issuance
Time

The mandate is issued 21 days after judgment. A timely petition for rehearing will stay the issuance. If the petition is denied, the mandate will issue 7 days later. If a stay of mandate is sought, only the original of a motion need be filed.

Stay

A motion for stay of the issuance of the mandate shall not be granted simply upon request. Ordinarily the motion will be denied unless it would not be frivolous or filed merely for delay and would present a substantial question or otherwise set forth good or probable cause for a stay.

William K. Slate, II
Clerk

Enclosure

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 82-1673

Mary F. Shope, etc.

Appellant.

versus

Richard Schweiker,

Appellee.

ORDER

Upon consideration of the appellant's petition for rehearing and suggestion for rehearing en banc, and no judge having requested a poll on the suggestion for rehearing en banc,

It is ADJUDGED and ORDERED that the petition for rehearing is denied.

Entered at the decision of Judge Sprouse for a panel consisting of Judge Sprouse, Judge Ervin and Judge Butzner.

For the Court:

FILED
Apr 15, 1983
U.S. Court
of Appeals
Fourth Circuit

/s/ William K. Slate, II
CLERK

Appendix C

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA

BRYSON CITY DIVISION

B-C-81-242

Mary F. Shope, Executrix of
the Estate of GEORGE W. SHOPE,
deceased,

Plaintiff,

v.

RICHARD SCHWEINER, Secretary
of Health and Human Services
of the United States,

Defendant.

MEMORANDUM OF DECISION

The Plaintiff brought this action pursuant to 205(g) of the Social Security Act, as amended [42 U.S.C.A. §405(g)] to obtain judicial review of the dismissal of her request for a hearing on her claim for disability benefits under Title II of the Social Security Act. The Plaintiff is the duly appointed Executrix of the Estate of George W. Shope, deceased, and the surviving spouse of the deceased. This matter is presently before the Court

upon the Defendant's motion to dismiss. Hearings were held on this motion on March 15, 1982 and May 17, 1982 and the parties were given until June 1, 1982 to submit additional briefs. After a careful consideration of the record, briefs and arguments of counsel, the Court now enters its findings and conclusions.

Mr. Shope filed an application for a period of disability and disability insurance benefits on August 8, 1977 (Rec. 79-82). The application was denied initially on August 30, 1977 (Rec. 77-78). The first request for reconsideration filed March 10, 1978, was dismissed for late filing (Rec. 27). However on October 6, 1978 the Secretary denied Shope's application on reconsideration because Shope had not met the earnings requirement at the time of the claimed onset of disability or at any later date (Rec. 23). Mr. Shope submitted additional

evidence on his insured status in August 1979 and the Social Security Administration notified him by letter dated February 26, 1980 that the evidence he had presented did not change the previous determination and that he still did not meet the insured status requirements.

Mr. Shope did not make a written request for a hearing until December 15, 1980, more than two years after the request deadline.¹ Apparently Mr. Shope made several oral requests for a hearing prior to his written request. Len Barone, a case worker for the Secretary, attached a statement to Mr. Shope's written request for a

¹ Title 20, CFR §404.933 requires that a request for a hearing must be in writing and must be made within sixty days after the date the claimant received notice of the previous determination. Title 20, CFR §404.933(c) allows the claimant to request for an extension of time to file a hearing request if he missed the original filing deadline. If the claimant can show "good cause" for missing the deadline, the time period will be extended. 20 CFR §404.933(c) and 404.911.

hearing and stated:

. . . Recon was filed-denied-w/e stated that he wanted a hearing. However formal request was never filed and therefore hearing was never held. w/e has submitted evidence periodically during the last 2 yrs. but no notice re. hearing ever given. I feel that it is the fault of this office that hearing was never held. We simply kept fwdg. info to program center and failed to get formal request for hearing. I sincerely believe good cause for late filing should be found in this case.

An administrative law judge (hereinafter ALJ) dismissed the request for hearing on May 8, 1981 because the hearing request was not filed within 60 days of the date of receipt of the reconsideration determination notice as required by the regulations. The ALJ also found that good cause for extension of time for filing had not been shown (Rec. 7-8). Mr. Shope died on May 31, 1981, and Mary Shope was substituted as party Plaintiff on June 15, 1981. The Appeals Council affirmed the denial of the hearing request on August 13, 1981.

The Defendant contends in its motion to dismiss that this Court lacks jurisdiction (1) because the Plaintiff failed to exhaust the administrative remedies, (2) because there has been no "final decision" of the Secretary as required by 42 U.S.C.A. §405(g), and (3) to review alleged abuses of agency discretion in refusing to extend time for filing. The Plaintiff argues that Mr. Shope did everything he was required to do under the law and made a timely request for a hearing. She contends that after Mr. Shope orally requested a hearing, the local Social Security office failed to perform a ministerial act, completing a Request for Hearing Form and having Mr. Shope sign it. The Plaintiff asserts that after the oral request for a hearing, it was the duty of the local Social Security office to explain the hearing procedure to Mr. Shope and to prepare him a written request for a hearing. Plaintiff Shope in-

sists that this case does not involve a failure to make a timely request for hearing or a judicial review of an abuse of agency discretion but rather concerns the failure of the Defendant to perform duties required of him initially by due process.

The Court reluctantly finds that it lacks jurisdiction to review the denial of the extension of time to file a hearing request. Title 42, U.S.C.A. §405(g) extends subject matter jurisdiction for judicial review of Social Security claims only to "final decisions of the Secretary made after a hearing. . . ." The Supreme Court has had at least three occasions to deal with the issue of judicial jurisdiction in Social Security cases.

In Weinberger v. Salfi, 422 U.S. 749, 95 S.Ct. 2457, 45 L.Ed.2d 522 (1975), the Supreme Court expressly held that §405(g) prevents review of the Secretary's decisions except as provided in §405(g) of the

Act. Id. at 757, 95 S.Ct. at 2457. The Court stated that under §405(g) a "final decision" of the Secretary is a "jurisdictional prerequisite" for judicial review and that exhaustion of administrative procedures "may not be dispensed with merely by a judicial conclusion" that a failure to exhaust the administrative procedure was not intentional. 422 U.S. 766, 95 S.Ct. at 2467. Under the statutory scheme contained in §405(g) and (h), the presence of a final decision is essential to determine when and if judicial intervention is proper. The Court recognized that the Secretary has the authority to "flesh out by regulation" the meaning of the term "final decision." Id., 95 S.Ct. at 2467. "The statutory scheme is thus one in which the Secretary may specify such requirements for exhaustion as he deems serve his own interests in effective and efficient administration. Id.

In Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), the Court expounded on the Salfi decision and explained that the final decision requirement consists of two elements: (1) the waivable element that the administrative remedies prescribed by the Secretary be exhausted and (2) the non-waivable "jurisdictional" element that a claim for benefits shall have been presented to the Secretary. Id. at 326, 96 S.Ct. at 899. As in Salfi, the Court in Mathews carved out a narrow exception to the exhaustion requirement; The Secretary may waive the exhaustion requirement if he satisfies himself, at any stage of the administrative process, that no further review is warranted because a matter of constitutional law concededly beyond the Secretary's competence to decide or to grant the relief sought is involved. Mathews v. Eldridge,

424 U.S. at 330, 96 S.Ct. at 900. Weinberger v. Salfi, 422 U.S. at 765-767, 95 S. Ct. at 2467.

In Califano v. Sanders, 430 U.S. 99, 97 S.Ct. 980, 51 L.Ed.2d 192 (1977), the Supreme Court held that §405(g) "cannot be read to authorize judicial review of alleged abuses of agency discretion in refusing to reopen claims for social security benefits." Id. at 107-108, 96 S.Ct. at 985.

In the present case, there is no doubt that Shope presented his claim for disability benefits to the Secretary. However, Shope failed to exhaust his administrative remedies by failing to file timely his request for hearing. The Secretary has not waived the exhaustion requirement since there is no constitutional question involved. Mr. Shope's failure to file a request for hearing timely ended the administrative action. Under the regulations as promulgated by the Secretary, it was then at the

discretion of the Secretary as to whether or not to reopen the matter and to allow Shope to have a hearing. Requests for reopening and for extensions of time are both procedural devices and after the time for appeal to the next level of administrative review has expired and are addressed to the sole discretion of the Secretary. The ALJ made the discretionary determination that the claimant had failed to establish "good cause" to extend the time for filing. Under the authority of Salfi and Mathews, The Court finds that the denial of the request to extend time for the filing of a hearing request was not a "final decision," that Shope failed to exhaust his administrative remedies and that there is no constitutional claim exception involved. Furthermore, this case is at most an example of an alleged abuse of agency discretion. Under Sanders, this Court is without jurisdiction under §405(g) to review abuse of

agency discretion.

Therefore, under the authority of Salfi, Mathews and Sanders, this Court lacks jurisdiction to review the denial of the motion to extend time for filing and must dismiss the action. The Court concludes that the Defendant's motion to dismiss for lack of jurisdiction should be allowed.

A judgment in accordance with the above findings and conclusions shall be entered simultaneously herewith.

This the 19th day of July, 1982.

/s/ Woodrow W. Jones

Chief Judge

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA

BRYSON CITY DIVISION

B-C-81-242

MARY F. SHOPE, Executrix of
the Estate of GEORGE W. SHOPE,
deceased,

Plaintiff,

v.

RICHARD SCHWEIKER, Secretary
of Health and Human Services
of the United States,

Defendant.

JUDGMENT

THIS MATTER was heard before the Court
and the issues having been determined as
shown by a Memorandum of Decision entered
by the Court simultaneously herewith;

IT IS ORDERED, ADJUDGED, AND DECREED
that the decision of the Secretary of
Health and Human Services denying benefits
under the Social Security Act to the Plain-
tiff be and the same is hereby affirmed,
and the action is hereby dismissed.

The Clerk is directed to send a copy of the Memorandum of Decision and this Judgment to the attorney for the Plaintiff and to the United States Attorney.

This the 19th day of July, 1982.

s/ Woodrow W. Jones

Chief Judge

REPORT OF CONTACT
(Use only of Form 100-1)

13

257-05-5572

George W. Shon

TO: NE MAT SE GL WN MAH
BDI BIC DDS

PERSONS CONTACTED AND ADDRESSES ☐ RECORD PERSON ☐ OTHER (Specify)

CONTACT MADE ☐ DO ☐ NO ☐ HOME ☐ PHONE ☐ OTHER

DATE OF CONTACT

SUBJECT: Good Cause - After Hearing -
The wife filed for disability in 1977 - At that time I also filed a request for return to (20/40 involved) No decision was ever made because of the 20/40 issue - He was denied on the basis that 20/40 not met SSA - removed SE (impaired returns) - Knox was filed - denied - Wife stated he wanted a hearing - However formal request was never filed and therefore hearing was never held. Wife has submitted evidence periodically during the last 5- yrs. but no notice re. hearing ever given.

SIGNATURES
DISTRICT OFFICE (Name, Address & Code)

☐ CR ☐ FR ☐ SN ☐ CLAIMS
☐ OTHER (Specify)

DATE OF REPORT

PAGE 1 of 2

REPORT OF CONTACT
(Use ink or typewriter)

14

ACCOUNT NUMBER AND DATE
257-05-53-78

TO: NE MAT SE GL WN MAM
BDI DIO DDS

NAME OF AGENT CARRIER OR SA PERSON
George W. Stone

PERSON'S CONTACTED AND ADDRESS: ☐ WE OR SE PERSON ☐ OTHER (Specify)

CONTACT MADE: ☐ DO ☐ BG ☐ CS ☐ HOME ☐ PHONE ☐ OTHER

DATE OF CONTACT

SUBJECT

I feel that it is the fault of this office, that Quierius was never held - We need to get two into to provide control as I tried to get him request for hearing. I sincerely believe good cause for State filing should be filed in this case.

Signature: [Signature]
168191
Franklin NC (452)

☐ IN ☐ FR ☐ SR ☐ CLAIMS ☐ CLERICAL
☐ OTHER (Specify)

DATE OF CONTACT
10/15/82
PAGE 2

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
BRYSON CITY DIVISION

CIVIL NO. B-C-81-242

MARY F. SHOPE, Executrix of the
Estate of George W. Shope,
deceased,

Plaintiff,

vs.

RICHARD SCHWEIKER, SECRETARY OF
HEALTH AND HUMAN SERVICES OF THE
UNITED STATES,

Defendant.

AFFIDAVIT

STATE OF NORTH CAROLINA
COUNTY OF SWAIN

I, JAMES H. HOLLOWAY, being first
duly sworn, state the following upon per-
sonal knowledge and oath:

1. I am co-counsel for Plaintiff in the
above entitled-action.
2. In the course of my investigation of
the matters and things at issue herein,
I had occasion, with prior approval of
the office of the United States Attor-

ney, to engage in a telephone conversation on March 12, 1982 with LEO BARONE an official of the Franklin District Office of the Social Security Administration, wherein she related to me the following:

That she personally knew the decedent GEORGE SHOPE and that she was familiar with his claim and claim file for Social Security Disability benefits.

That GEORGE SHOPE came into the Franklin Social Security Office on several occasions within the time period required for requesting a hearing, and that he did in fact ask for his hearing on those occasions.

THIS the 15th day of March, 1982.

/s/ JAMES H. HOLLOWAY
JAMES H. HOLLOWAY, Affiant

SUBSCRIBED TO AND SWORN TO BEFORE ME this 15th day of March, 1982.

/s/ PATRICIA H. NORFIELD
NOTARY PUBLIC

My commission expires:

1/16/83

(SEAL)

Social Security Notice of Reconsideration

23

From: Department of Health, Education, and Welfare
Social Security Administration

Date: 3/11/79

III-676:TD-1
251-05-5572-1A

Your Claim Number:

Mr. George W. Shope
Box 7
Coto, North Carolina 28763

251-05-5572

Dear Mr. Shope:

As you requested, your claim has been reconsidered. It has been found that the original decision was correct and in accordance with the law and regulations. The enclosed Reconsideration Determination fully explains the decision reached.

This reconsideration was made by a specially designated staff, different from the staff that made the original decision, and specially trained in the handling of reconsiderations. This staff made an independent and thorough examination of all the evidence on record about your claim.

If you believe that the Reconsideration Determination is not correct, you may request a hearing before an administrative law judge of the Bureau of Hearings and Appeals. If you want a hearing, you must request it not later than 60 days from the date you receive this notice. You should make such request through any social security office. Please read the enclosed leaflet for a full explanation of your right to appeal.

Carmell:aca:9/13/79

251-05-5572

Enclosures:

OA-D1227

HEW Publication No. (SSA) 76-10282 DHA-1

Department of Health, Education, and Welfare
Social Security Administration

SSA-L84813-76

Appendix G